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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 961 [redacted] 1

THE ATLANTIC REFINING COMPANY,
Appellant,

vs.

COMMONWEALTH OF VIRGINIA.

APPEAL FROM THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

STATEMENT OF APPELLEE OPPOSING JURISDICTION.

ABRAM P. STAPLES,
Attorney General of Virginia;
W. W. MARTIN,
Counsel for Appellee.

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STATEMENT OF APPELLEE OPPOSING JURISDICTION.

The Validity of the Identical Statute Here Challenged Applied in Similar Circumstances Has Been Upheld by a Prior Decision of This Court, and, Therefore, No Substantial Federal Question is Presented.

The validity of the identical statute here challenged, under the provisions of which the tax complained of was imposed (Acts of General Assembly of Virginia, 1910, Chapter 53, Section 38a, Page 79, now Section 207 of the Tax Code of Virginia, Michie's Code of Virginia, 1930), applied

in similar circumstances, was upheld in *General Railway Signal Company* v. *Virginia,* 246 U. S. 500, and the statute has not been amended since that decision. See also *Western Gas Construction Company* v. *Virginia,* 276 U. S. 597 (Mem.). Therefore, no substantial Federal question is presented.

Hannis Distilling Co. v. *Baltimore,* 216 U. S. 285;

Equitable Life Asssurance Society v. *Brown,* 187 U. S. 308;

Leonard v. *Vicksburg, S. & P. R. Co.,* 198 U. S. 416;

Levering & Garrigues Co. et al. v *Morrin et al.,* 289 U. S. 103;

Utley et al. v. *City of St. Petersburg,* 292 U. S. 106;

Ralph Sollitt & Sons Construction Co. v. *Virginia,* 292 U. S. 599.

General Railway Signal Company v. Virginia, 246 U. S. 500, Has Not Been Overruled by Cudahy Packing Company v. Hinkle, 278 U. S. 460.

Appellant's Chief reliance is based on the theory that *General Railway Signal Company* v. *Virginia, supra,* has been overruled by *Cudahy Packing Company* v. *Hinkle, supra.* The court below also conceived this to be the pivotal issue when it said:

> "As indicated, the narrow issue is this: Has the Cudahy case overruled the General Railway Signal Company case and the Western Gas Construction Company case? The issue is too serious to warrant us in believing that the Supreme Court with an opportunity to express itself would have been content to do this by inference only."

The discussion in the opinion below makes necessary only a bare summary of the differences in the nature, operation

and effect of the Washington and Virginia exactions as applied to the existing facts.

In the *Cudahy Packing Company* case *additional* filing fees, because of *increased* capital and annual license taxes, both reckoned upon authorized capital stock and with a maximum limit of $3,000, were demanded of a foreign corporation already admitted to do business in Washington and long carrying on a closely associated interstate and intrastate business there, in the conduct of which it had acquired substantial property in that State. Other obvious yardsticks for the measure of the taxes were present.

The statute here challenged, *in effect for more than thirty years,* as applied to the facts present in the *General Railway Signal Company* case, required of a foreign corporation a single entrance fee with a maximum limit of $5,000, based upon, but not varying in direct proportion to, its authorized capital stock, as one of the conditions precedent to its securing the *right* to do intrastate business in Virginia in corporate capacity.[1] That Virginia is not covertly attempting to use its powers to attain unconstitutional results is forcibly brought out in the case of appellant here, which has for a number of years carried on an interstate business in this State without payment or demand of the entrance fee, the fee only being required when it applied for a certificate of authority to do local business in its own name.[2] The tax, being a pure entrance fee, could not be measured by local business done, for it could have done no such business lawfully; it could not be measured by prop-

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[1] For other conditions precedent, see Sec. 3847 of the Code of Virginia, as amended by Acts of Assembly of 1926, page 482, included herein as Appendix A.

[2] Compare *Railway Express Agency* v. *Virginia,* 282 U. S. 440.

erty used in local business, as manifestly it could have none so used.[3] The effect of the Virginia tax is as if a flat entrance fee were imposed upon a foreign corporation, based upon the size of the corporation, that being, before admission, the best standard available to anticipate and measure the value of the right granted.

General Railway Signal Company v. *Virginia, supra,* was decided subsequent to many leading decisions of this Court in which privilege taxes imposed by States upon foreign corporations were exhaustively considered, notably, *Western Union Co.* v. *Kansas,* 216 U. S. 1; *Ludwig* v. *Western Union Tel. Co.,* 216 U. S. 146; *Looney* v. *Crane Co.,* 245 U. S. 178; *Cheney Bros. Co.* v. *Massachusetts,* 246 U. S. 147; *Locomobile Co.* v. *Massachusetts,* 246 U. S. 146; *International Paper Co.* v. *Massachusetts,* 246 U. S. 135. It was likewise decided after the enunciation of the doctrine of "unconstitutional conditions".

The fact that the entrance fee involved here, as in *General Railway Signal Company* v. *Virginia, supra,* is the only State exaction of a similar nature which has been passed upon by this Court, required as a condition precedent to the right to do intrastate business therein before any such business is done, clearly distinguishes it from all other cases and makes pertinent the following statement from *International Paper Co.* v. *Massachusetts,* 246 U. S. 135, 140, 141:

> "Cases involving the validity of state legislation of this character often have been before this court. The statutes considered have differed greatly, as have the circumstances in which they were applied, and the

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[3] At the time of entrance appellant had no property in Virginia used even in interstate commerce. See printed record before the Supreme Court of Appeals of Virginia, pages 69, 70, 71.

questions presented have varied accordingly. In disposing of these questions there has been at times some diversity of opinion among the members of the court and some of the decisions have not been in full accord with others. But the general principles which govern have come to be so well established as no longer to be open to controversy."

And it was subsequent to the establishment of "the general principles" which are "no longer * * * open to controversy" that *General Railway Signal Company* v. *Virginia, supra,* was decided.

Conclusion.

For the reasons stated it is respectfully submitted that the appeal herein does not present a substantial Federal question.

ABRAM P. STAPLES,
Attorney General of Virginia;
W. W. MARTIN,
Assistant Attorney General,
Counsel for Appellee.

APPENDIX A.

Section 3847 of the Code of Virginia:

"Every incorporated company doing business in this State shall have an office in the State at which all claim against the company due residents of the State may be audited, settled and paid; provided, however, that no foreign corporation which deposits securities with the treasurer of the Commonwealth for the protection of its patrons in Virginia shall be required to maintain an office in this State for such purpose. Every such company incorporated under a jurisdiction beyond the limits of the State (and hereinafter designated as a foreign corporation) shall, before doing business in this State, present to the State corporation commission (a) a written power of attorney executed in duplicate, appointing the secretary of the Commonwealth of this State and his successor in office its agent upon whom all lawful process shall be served, and who shall be authorized to enter an appearance in its behalf; (b) two duly authenticated copies of the charter of the corporation; and (c) a certificate of the auditor of public accounts, showing the payment into the treasury of the fee required by law to be paid by such corporation, and shall obtain from said State corporation commission, a certificate of authority to transact business in the State. It if (If it) shall be made to appear to the State corporation commission that said corporation has complied with the law relative to the obtaining of a certificate of authority for foreign corporations of the character of the applicant corporation, then said State corporation commission shall issue to said corporation a certificate of authority to transact business in the State. Said commission shall file and preserve in their office one copy each of the power of attorney, charter, certificate of the auditor, and a certificate of the commission granting such certificate of authority, and forward copies of the said documents to the secretary of the Commonwealth, who shall file and preserve the same in his office.

"If the charter of any foreign corporation thus authorized to transact business in this State is amended, or revised, two duly authenticated copies of such amendment or revision shall be presented to the State corporation commission and filed as copies of the original charter are required to be filed, and the fee required by law in such amendment or revision shall be paid in the manner prescribed by law.

"Any foreign corporation which has complied with the law, relative to domestication in this State, and whose certificate of authority to do business in this State has been surrendered or revoked and annulled, shall, upon re-entering the State, be required to pay the entrance fee and all other fees required by law, incident to domestication, and execute and file the power of attorney required herein, but such corporation shall not be required to again file copies of its charter or any amendment thereto heretofore filed.

"Such corporation shall pay the clerical fees for such certificate of authority and for filing such papers as prescribed by law.

"The provisions of this act, as amended, shall apply to foreign corporations licensed at the time of the passage of this act as well as to those thereafter licensed."